Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-630

NORTEK, INC.,
PETITIONER,

v.

ALEXANDER GRANT & COMPANY, ET AL.,
RESPONDENT,

v.

SANI DISTRIBUTORS, INC., ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JOHN F. BOMSTER,
RICHARD G. GALLI,
ADLER, POLLOCK & SHEEHAN, INCORPORATED,
One Hospital Trust Plaza,
Providence, Rhode Island 02903.
(401) 274-7200

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the
Supreme Court of the United States.

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ALEXANDER GRANT & COMPANY, ET AL.,
RESPONDENT,

v.

SANI DISTRIBUTORS, INC., ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The petitioner, Nortek, Inc. (Nortek), respectfully prays that a writ of certiorari issue to review the judgment and opinion, and decision on petition for rehearing, of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 5, 1976.

Opinions Below.

The opinion of the Court of Appeals, and opinion on rehearing, appear in the Appendix hereto (pages 1a-5a, 5a-6a).

Jurisdiction.

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 4, 1976, reported at 532 F. 2d 1013. A timely petition for rehearing was denied on August 5, 1976, reported at 536 F. 2d 625. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

Whether the Court of Appeals for the Fifth Circuit erroneously applied Florida's two-year Blue Sky statute of limitations, rather than its three-year fraud statute, so as to bar a cause of action under the Securities Exchange Act of 1934, § 10(b), and Rule 10b-5.

Whether, in its determination of applicable law, including limitations of action statutes, the Court of Appeals for the Fifth Circuit erred in failing to consider the place where the cause of action arose.

Whether the District Court's disposition of the matter on summary judgment, as approved by the Court of Appeals for the Fifth Circuit, was appropriate.

Statutes Involved.

Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78(j)(b):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> . . . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Florida Statutes Annotated, § 95:11(5)(a), (d):

95.11 Limitations upon actions other than for the recovery of real property. — Actions other than those for the recovery of real property can only be commenced as follows:

. . . . . .

(5) WITHIN THREE YEARS. —

(a) An action upon a liability created by statute, other than a penalty or forfeiture;

. . . . . .

(d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

. . . . . .

Florida Statutes Annotated, § 517.21:

(1) Every sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser; and the person making such sale and every director, officer or agent of or for the seller, if the director, officer or agent shall have personally participated or aided in any way in making the sale, shall be jointly and severally liable to the purchaser in an action at law in any court of competent jurisdiction upon tender of the securities sold or of the contract made, for the full amount paid by such purchaser, with interest, together with all taxable court costs and reasonable attorney's fees; provided, that no action shall be brought for the recovery of the purchase price after two years from the date of

such sale and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by such purchaser, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed:

(a) In case such securities consist of interest bearing obligations at the same rate as provided in such obligations; and

(b) In case such securities consist of other than interest bearing obligations at the rate of six per cent per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser.

(2) Any person having a right of action against a dealer or salesman under this section shall have a right of action under the bond provided in § 517.12.

Florida Statutes Annotated, § 517.301(1):

It is unlawful, and a violation of the provisions of this chapter, for any person:

(1) In the sale or purchase of any security in this state, including any security exempted under the provisions of § 517.05, and including any securities sold in any transaction exempted under the provisions of § 517.06, directly or indirectly:

(a) To employ any device, scheme, or artifice to defraud;

(b) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the state-

ments made, in the light of the circumstances under which they were made, not misleading;

(c) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

. . . . . .

Statement of the Case.

This case is one of two substantially identical causes of action brought respectively in the United States District Court for the District of Rhode Island (Rhode Island District Court) and the United States District Court for the Southern District of Florida (Florida District Court).

The complaint (App. 7a-15a) was one in five counts brought by Nortek against Alexander Grant & Company (Grant) et al. alleging that financial statements for Webb Realty Corp. (Webb) examined and reported on by Grant understated certain deferred tax liabilities and overstated certain retained earnings of Webb. Nortek purchased Webb alleging reliance upon Grant's work product. In its complaint, Nortek sought damages under the Securities Exchange Act of 1934, § 10(b), and Rule 10b-5 together with violations of the state securities laws, breach of contract on a third-party beneficiary theory and for negligence and gross neglect.

The Rhode Island District Court, petitioner's first forum choice, transferred the Rhode Island action (App. 16a-24a) to the Florida District Court where it was dismissed without prejudice, *sua sponte*, by the Florida District Court as duplicitous of the case before it. Thereafter, the Florida District Court granted defendant's motion for summary judgment.

The order of the Florida District Court appears at Appendix pages 44a-49a.

In its conclusions of law, the Florida District Court held, *inter alia*, that the two-year statute of limitations contained in § 517.21 of the Florida Blue Sky Laws barred the 10b-5 claim.

The Court of Appeals, on review, concluded that its decision in *Hudak* v. *Economic Research Analysts, Inc.*, 449 F. 2d 996 (5th Cir. 1974), required the application of the two-year statute of limitations contained in the Florida Blue Sky Law (F.S.A. 517.301(1)) and explicitly required the application of the forum state statute of limitations without regard to residency.

Reasons for Granting the Writ.

Introduction.

The action is one which, under Rule 10b-5 and common concepts of gross neglect and/or fraud, seeks to impose liability on a certified public accounting firm, in favor of a foreseeably reliant third party not in privity of contract with the accountant, for damages resulting from the acts and omissions of the accountant.

One or more of the operative acts giving rise to the completed cause of action occurred in Rhode Island, Florida and perhaps New York.

The 10b-5 action was found to be barred by the two-year Florida Blue Sky statute of limitations, as enunciated in *Hudak* v. *Economic Research Analysts, Inc.*, *supra*. In both courts below Florida law was applied to the remaining claims.

Petitioner believes that a writ should issue so as to permit it to show that the Court of Appeals was in error in con-

cluding that Nortek's claim was time barred, for the following reasons:

First, the underpinning for the decision below is a rationale, applied in *Hudak*, which is in conflict with that of other Circuits. See *United California Bank* v. *Salik*, 481 F. 2d 1012 (9th Cir. 1973), *cert. denied*, 414 U.S. 1004 (1973); *Mitchell* v. *Texas Gulf Sulphur Company*, 446 F. 2d 90 (10th Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971), *reh. denied*, 404 U.S. 1064 (1972). Second, the *Hudak* rationale and result, if ever they were sound, are now inapposite and inconsistent in light of this Court's decision in *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976), *reh. denied*, 96 S. Ct. 2194 (1976). Third, the *Hudak* rationale and result should not have been applied on the facts of the case.

Further, a writ should issue to permit petitioner to show that the court below erred in its determinations as to the substantive law applicable to petitioner's causes.

I. To Remove the Conflict Among the Circuits.

The Fifth Circuit in *Hudak* v. *Economic Research Analysts, Inc.*, *supra*, faced with a circumstance where a defrauded purchaser sought return of the purchase money, followed the reasoning of the Seventh and Eighth Circuits in selecting the state Blue Sky limitation of action, rather than the fraud statute. See *Hudak*, 499 F. 2d 996, at 1000, citing *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F. 2d 123 (7th Cir. 1972), and *Vanderboom* v. *Sexton*, 422 F. 2d 1233 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970).

The court viewed the Florida Blue Sky Statute — F.S.A. 517.301(1) — as the "mirror image" of Rule 10b-5. However, the *Hudak* court did not find that similarity totally dispositive. Rather, it contrasted the need for proof of scienter under

Florida common law fraud, and the lack of that requirement under the developing area of securities law in the Circuits, and in Florida. Further, it analyzed the similarity between the remedy sought by the plaintiff and those afforded by the Florida securities law statute, viz: rescission.

The *Hudak* court's analysis of these three factors led it to conclude that the appropriate statute of limitations to be applied was not the Florida fraud statute (F.S.A. 95.11(5)(d); three years from the date of discovery) but rather the two-year statute contained in the Blue Sky Law.

The Ninth Circuit has reached a contrary result on a contrary rationale. See *Douglass* v. *Glenn E. Hinton Investments, Inc.*, 440 F. 2d 912 (9th Cir. 1971); *United California Bank* v. *Salik*, *supra*. In that Circuit, the forum state's common law fraud statute of limitations continues to be applied to causes of action arising under 10b-5 notwithstanding state statutes of limitations similar to § 10(b). See Lowe, *A Cry for Help: The Ninth Circuit and the Statute of Limitations in Rule 10b-5 Actions*, 22 U.C.L.A. L. R. 947 (1975).

Petitioner suggests there is no sound reason for disparate treatment of plaintiffs seeking relief in the federal courts of the Fifth Circuit and those in the federal courts of the Ninth Circuit. The rationale enunciated once again by the Ninth Circuit in the *Salik* case restates the view that the broad remedial policies of the federal securities laws are best served by a longer, not a shorter, statute of limitations.

There, as here, an injured party could sue within three years of discovery of the fraud, whereas under the Blue Sky statute advanced the period would be substantially shortened.

We respectfully submit there is no warrant for concluding that a different federal policy is served in one Circuit from that served in another, and the conflict ought be resolved.

II. To Permit Review of the Hudak Rationale in Light of this Court's Decision in Ernst & Ernst v. Hochfelder.

At the time that the *Hudak* case first came before the Fifth Circuit, it was in the context of a relaxation of the scienter requirement in securities regulation provisions. See 499 F. 2d at 1000. The common law of Florida, by contrast, imposed upon the plaintiff the requirement of demonstrating, *inter alia*, "(1) a false statement of fact; (2) known by the defendant to be false at the time it was made; (3) made for the purpose of inducing the plaintiff to act in reliance thereon. . . ." *Poliakoff* v. *National Emblem Insurance Company*, 249 So. 2d 477, 478 (Fla. App., 3d Dist., 1971).

Thus, in attempting to determine the "resemblance" between the 10b-5 action and the comparable state action, there may well have been merit in rejecting the common law fraud analogy. In doing so the court was opting away from a scienter requirement, and adopting one consistent with developing securities laws in the Fifth Circuit. Indeed, the *Hudak* court concurred that the similarity between Blue Sky and 10b-5 scienter requirements would be "crucial."

Clearly, to the extent that there was doubt as to whether scienter is a requirement in a 10b-5 action, that matter seems well put to rest. The scienter factor which may have deterred the *Hudak* court from opting for the common law fraud limitation of actions statute has now been removed by *Ernst & Ernst* v. *Hochfelder*, *supra*. The impact of *Hochfelder* upon a rationale which places important reliance on the lack of scienter is well summarized in *Bailey* v. *Piper, Jaffray & Hopwood, Inc.*, CCH Fed. Sec. L. Rep. ¶95,711, at 90,461 (D. Minn. 1976). There, a court which previously accepted a *Hudak*-type analysis reversed direction and chose a fraud limitation, on the strength of *Ernst & Ernst*.

The question comes down, we would submit, to choosing the limitation provision which best effectuates the federal policy at issue. If the federal policy itself requires scienter then it would appear the most appropriate limitations of action statute is the Florida fraud statute. At the very least, the scienter factor which weighed so heavily under a *Hudak* analysis has now shifted its weight to the other side of the scale. The rationale of *Hudak* has been redirected by *Hochfelder* and should be reviewed in the light of that decision.

III. To Determine Whether, on the Facts of this Case, the Rule of Florida Law Governs.

The case in the District Court, as well as for the Court of Appeals, was briefed extensively on the question whether the courts should apply Florida law or Rhode Island law to the causes of action asserted in the complaint. The dispute arose from two facts: First, the case arose out of a multi-state transaction involving a Rhode Island plaintiff, a New York based accounting firm, and a Florida based corporation which was the subject matter of the purchase agreement. Conflict of laws questions abounded. These issues were not the subject of any express consideration by the Court of Appeals, except for its conclusion that *Hudak* applied without regard to "residency." Second, an action identical to that now before this Court had previously been filed in Rhode Island and had been transferred to Florida for the convenience of the defendants. Thereafter, the Rhode Island action was dismissed "without prejudice" by the Florida District Court. By reason of the conflicts of laws issues, as well as under principles analogous to those enunciated in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), petitioner would show that Rhode Island law should apply. And, if such is determined to be the case, then the complaint is in all respects viable.

IV. To Permit Review of the Disposition of the Matter on Summary Judgment.

The scope of the order entered by the District Court disposing of the issues of the case appears at App. 44a-49a. This order, on its face, disposed of substantially every issue of fact and law adversely to petitioner.

Extensive discovery was had in this case by both parties, a score of prospective witnesses having been deposed in Rhode Island, Connecticut, New York, Massachusetts, Washington, D.C., Florida and Illinois. However, all discovery had not been completed at the time summary judgment was entered; Grant had not yet identified its expert witnesses and both parties had yet to respond fully to outstanding supplemental interrogatories. The issues as to which the parties had differences were the subject of an extensive pre-trial stipulation. See App. 25a-43a. Notwithstanding the scope of the stipulated issues, the District Court concluded that the alleged deficiency with respect to the deferred taxes was not material to or relied upon with respect to the transaction in question and did not, as a matter of law, constitute fraud or gross neglect.

A petition should issue to review whether, given the scope of the issues, determination on summary judgment in this case was appropriate.

Conclusion.

This case presents important substantive and procedural issues with respect to a cause of action which has been thoroughly prepared and is ready to be tried. The parties contemplate that a trial will last from five to seven days.

The grant of a writ will afford the petitioner its last opportunity for a day in court on the merits of its cause. Petitioner respectfully requests that it be granted the opportunity to show why that should occur.

Respectfully submitted,

JOHN F. BOMSTER,
RICHARD G. GALLI,
ADLER, POLLOCK & SHEEHAN,
INCORPORATED,
One Hospital Trust Plaza,
Providence, Rhode Island 02903.
(401) 274-7200

Appendix.

Except for the decisions of the Court of Appeals, the materials in this Appendix are taken from the Appendix submitted with the briefs in the Court of Appeals.

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United States Court of Appeals for the Fifth Circuit.

No. 75-1030.

NORTEK, INC.,
PLAINTIFF-APPELLANT,

v.

ALEXANDER GRANT & COMPANY ET AL.,
DEFENDANTS-THIRD-PARTY PLAINTIFFS,
APPELLEES-APPELLANTS,

v.

SANI DISTRIBUTORS, INC., ET AL.,
THIRD-PARTY DEFENDANTS-APPELLEES.

June 4, 1976.

Bernard R. Pollock, John F. Bomster, Providence, R.I., Paul, Landy & Beiley, Lawrence R. Heller, Miami, Fla., George Chimento, Providence, R.I., for plaintiff-appellant.

Robert Orseck, Robert L. Parks, Miami, Fla., Howard L. Kastel, Chicago, Ill., for Alexander Grant & Co.

Morton P. Brown, North Miami, Fla., for Sani Dist. Inc., et al.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, TUTTLE and GEE, Circuit Judges.

GEE, Circuit Judge:

The Alexander Grant accounting firm was hired by Sani Distributors, owner of the Webb Company, to audit that company and prepare financial statements adequate for registration by a prospective buyer. Nortek, Inc. purchased the Webb Company and now brings this suit for damages, complaining that Grant's audit underestimated tax liabilities of the Webb Company by $640,000 and that Nortek detrimentally relied on Grant's report of the financial state of Webb Company in completing its purchase of that company. The district court granted defendant's motion for summary judgment. We affirm.

The federal securities laws contain no limitations period expressly applicable to claims under §§ 10(b) and 17(a) and Rule 10b-5. Consequently, we must apply the forum state's limitations period applicable to that state cause of action which bears the closest resemblance to the SEC section sued under. *Hudak* v. *Economic Research Analysis, Inc.*, 499 F. 2d 996 (5th Cir. 1974) held that § 517.301(1) of the Florida Blue Sky Law with its two-year statute of limitations controls a federal suit under § 10(b) and the related Rule 10b-5 of the Securities Act. The cause of action stated under § 17(a) of the Securities Act of 1933 is controlled by the same statute. *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F. 2d 123 (7th Cir. 1972).

Appellant argues that this rule should not apply in the present case because not all parties are residents of Florida and there is some question about where the cause of action accrued. But the language of *Hudak* very explicitly said the forum state's statute of limitations applies without regard to

the residency of any of the parties. Appellant also seeks to escape *Hudak's* mandate that Florida's two-year statute of limitations bars this cause of action by pointing out that he is seeking damages rather than rescission. Although the only remedy provided in § 517.21 of the Florida statutes is rescission, nevertheless it is the section of the Blue Sky Law most similar to §§ 10(b), 17(a), and Rule 10b-5, and its two-year statute of limitations should be applied even when plaintiff seeks damages under the federal statute. The trial court was correct in holding that plaintiff's cause of action under the federal securities laws is barred by Florida's two-year statute of limitations.

Appellant also asserts claims in negligence and as a third-party beneficiary of the auditing contract. In the leading case involving the duty of CPA's to parties with whom they are not in privity of contract, Judge Cardozo found that CPA's owed no legal duty to plaintiffs in the absence of privity. *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). Judge Cardozo went on to say that the same result would be reached in terms of contract. *Id.* at 445. Florida courts have similarly characterized the duty of CPA's, and in this diversity action we are bound by these Florida decisions. In circumstances inescapably similar to those presented here, the Florida courts have denied any relief. *Investment Corp. of Florida* v. *Buchman*, 208 So. 2d 291 (Fla. 1968). The question confronted by the Florida appellate court in *Buchman* was clearly stated:

> [I]n the absence of fraud, are certified public accountants liable to known third parties for negligence in preparation of a certified financial statement when the certified public accountants had knowledge, at the time of preparation, that the third party intended to rely on the statement.

208 So. 2d at 293-94. The court answered no.

Appellant argues that the Florida courts have receded from their own privity requirement in the case of *A.R. Moyer, Inc.* v. *Graham*, 285 So. 2d 397 (Fla. 1973). There, in response to questions certified to it by our court, the Florida Supreme Court held that a third-party general contractor who might foreseeably be injured or sustain economic loss proximately caused by the negligent performance of an architect's or engineer's contractual duty had a cause of action notwithstanding the absence of privity. Although the court in *Moyer* seemed to waver from the privity requirement set forth in *Buchman* and earlier in *Sickler* v. *Indian River Abstract & Guaranty Co.*, 142 Fla. 528, 195 So. 195 (1940), its relaxation of the privity requirement may be limited to the architect-general contractor situation. The court did not specifically overrule *Buchman* and relied on the architect's direct supervision and control to find a cause of action. 286 So. 2d at 399. The Florida courts have been reluctant to read *Moyer* as generally eliminating the privity requirement.[1] Until *Buchman* — a recent decision precisely about the duties of CPA's — is directly overruled, we find it bars Nortek's negligence cause of action and its contract action as a third-party beneficiary.

Finally, appellant alleges that Grant was guilty of gross negligence, relying on the notion expressed in *State Street Trust Co.* v. *Ernst*, 278 N.Y. 104, 15 N.E. 2d 416 (1938), that negligence "if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the balance sheet." *Id.* at 419. The *Buchman* decision stated that in the absence of fraud CPA's are not liable to known third parties for negligence. Nortek thus attempts to establish fraud to escape *Buchman*. But the escape fails because Nortek's action for fraud is barred by the Florida statute of limitations.

[1] *Chelsea Title & Guaranty Co.* v. *Louis Briggs Constr. Co.*, 315 So. 2d 229 (Fla. App. 1975).

Nortek's other contentions on appeal are without merit, and because we find the *Hudak* case a complete bar to any securities cause of action and the *Buchman* decision a complete bar to any negligence or contract cause of action, the trial court's decision is AFFIRMED.

United States Court of Appeals for the Fifth Circuit.

No. 75-1030.

NORTEK, INC.,
PLAINTIFF-APPELLANT,

v.

ALEXANDER GRANT & COMPANY ET AL.,
DEFENDANTS-THIRD-PARTY PLAINTIFFS,
APPELLEES-APPELLANTS,

v.

SANI DISTRIBUTORS, INC., ET AL.,
THIRD-PARTY DEFENDANTS-APPELLEES.

August 5, 1976.

Bernard R. Pollock, John F. Bomster, Providence, R.I., Paul, Landy & Beiley, Lawrence R. Heller, Miami, Fla., George L. Chimento, Providence, R.I., for plaintiff-appellant.

Robert Orseck, Robert L. Parks, Miami, Fla., Howard L. Kastel, Chicago, Ill., for Alexander Grant & Co.

Morton P. Brown, North Miami, Fla., for Sani Dist. Inc., and others.

Appeals from the United States District for the Southern District of Florida.

On Petition for Rehearing.

Before BROWN, Chief Judge, TUTTLE and GEE, Circuit Judges.

PER CURIAM:

Appellant correctly asserts that the Florida blue-sky law's two-year statute of limitation does not bar its cause of action for gross negligence. This is governed by the Florida fraud statute of limitation, and appellant alleges that its complaint falls within this three-year period. However, the trial court found conclusively that defendant's action did not constitute fraud or gross negligence, a finding with which we agree. We, therefore, put aside all problems of date of discovery and decline to consider further whether the negligence here was so gross as to constitute constructive fraud. *See State Street Trust Co.* v. *Ernst*, 278 N.Y. 104, 15 N.E. 2d 416 (1938). The petition for rehearing is DENIED.

United States District Court
Southern District of Florida
Miami Division

NORTEK, INC. — No. 73-1866 Civ. WM

vs.

ALEXANDER GRANT & COMPANY, A PARTNERSHIP, CHARLES MAURER, BYRON CHERKAS, ROBERT BERGER AND WILLIAM R. METTE, INDIVIDUALLY AND AS PARTNERS OF ALEXANDER GRANT & COMPANY, AND JOHN DOE, ET AL., INDIVIDUALLY AND AS PARTNERS OF ALEXANDER GRANT & COMPANY, AND RALPH RAHMET, A FORMER PARTNER OF ALEXANDER GRANT & COMPANY

Complaint.

This action arises *inter alia* under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and the Securities Act of 1933, as amended, 15 U.S.C. § 77a et seq. and the Rules promulgated thereunder. This Court has jurisdiction under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and under the Securities Act of 1933, as amended, 15 U.S.C. § 77v. Jurisdiction is further founded on diversity of citizenship, amount, and pendent jurisdiction.

Plaintiff, Nortek, Inc. ("Nortek"), is a Rhode Island corporation having a principal place of business in Cranston, Rhode Island. Defendant, Alexander Grant & Company ("Alexander Grant"), is a partnership of certified public accountants engaged in the practice of accounting with places of business in the States of New York, Illinois, Massachusetts and Florida, and which by its partners, agents and employees, transacts business *inter alia* in the States of Rhode Island and Florida. Defendant, Charles Maurer, is a partner of Alexander Grant at its New York office and is a citizen of a state other than Rhode Island. Defendant, Byron Cherkas, is a partner of Alexander Grant at its Miami office and is a citizen of the State of Florida. Defendant, Robert Berger, is a partner of Alexander Grant at its Boston office and is a citizen of the Commonwealth of Massachusetts. Defendant, William R. Mette, is a partner of Alexander Grant at its Chicago office and is a citizen of the State of Illinois. John Doe, et al., are partners and/or employees of Alexander Grant who are citizens of a state other than Rhode Island. The matter in controversy exceeds the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

First Cause of Action

Violation of Securities Exchange Act of 1934

1. At all times material hereto, Webb Realty Corp. ("Webb") was a Florida corporation with its principal place of business at Miami, Florida.

2. At all times material hereto, the sole and controlling shareholder of Webb was Sani Distributors, Inc. ("Sani"), a New York corporation with its principal place of business at Miami, Florida.

3. At all times material hereto, controlling shareholders of Sani were Sham G. Sani, a resident of Dade County, Florida; Lal Sani, a resident of New York; and Ishwer Sani, a non-resident of the United States.

4. For a period of time prior to July 3, 1969, Nortek and officers of Sani, including its president, Sham G. Sani, had under discussion the possible acquisition by Nortek of certain securities consisting of all of the stock of Webb ("Stock") and on or about July 3, 1969, entered into an agreement with Sani, which agreement was from time to time amended (hereinafter collectively referred to as "Purchase Agreement") to acquire said Stock upon terms and condition set forth in the Purchase Agreement at an aggregate price of Six Million ($6,000,000) Dollars.

5. The Purchase Agreement *inter alia* contemplated that Nortek would make a public offering of its securities in the aggregate minimum amount of Ten Million ($10,000,000) Dollars, and the completion of such offering was an express condition of its obligation to close.

6. Section 3.2(a) of the Purchase Agreement required Sani to furnish or cause to be furnished to Nortek *inter alia* such certified financial statements for a registered public offering as may be required under the Securities Act of 1933 and the Rules thereunder for a registrant, as well as certified financial statements set forth in schedules annexed to the Purchase Agreement.

7. In pursuance of the transactions contemplated by the Purchase Agreement, Sani and Webb engaged Alexander Grant, its partners, agents and employees, including Ralph Rahmet, formerly a partner in Alexander Grant, and John Doe, et al. (hereinafter, acting individually or through their partners, employees or agents, "Defendants"), to audit and certify the balance sheet of Webb as of May 31, 1969, so as to

(a) provide Nortek with audited statements upon which it could rely in closing the transaction, and

(b) *inter alia*, enable Nortek otherwise to implement the transactions contemplated by the Purchase Agreement.

8. Thereafter, Defendants, with knowledge of the object, purpose and end for which the audit was to be conducted, did so audit and certify the balance sheet of Webb as of July 3, 1969, and issued a statement with respect thereto (hereinafter "Auditors' Report").

9. Said Auditors' Report contained Alexander Grant's opinion that *inter alia* the balance sheet of Webb as of May 31, 1969, presented fairly the financial position of Webb.

10. At the time of the issuance of the Auditors' Report and at all times material hereto, including December 10, 1969, Defendants knew or had reason to know or should have known that the liabilitites of Webb shown on the balance sheet of Webb were understated by an amount not less than Six Hundred Forty-Three Thousand ($643,000) Dollars, and failed to reflect said understatement in the Auditors' Report.

11. As of the time of the issuance of the Auditors' Report and at all times material hereto, including December 10, 1969, Defendants knew or had reason to know or should have known that the retained earnings of Webb stated on the balance sheet of Webb did not fairly present the financial position of Webb since said statement of retained earnings did not reflect the understatement of liabilities and thus overstated retained earnings by an amount not less than Six Hundred Forty-Three Thousand ($643,000) Dollars, and failed to reflect said understatement of liabilities of overstatement of retained earnings in the Auditors' Report.

12. The understatement of liabilities and overstatement of retained earnings by Defendants were made knowingly and intentionally and with the knowledge that the purpose of the Auditors' Report was to induce Nortek to acquire the Stock

of Webb, to pay the purchase price and to do the other acts contemplated by the Purchase Agreement.

13. The Auditors' Report constituted an untrue statement of a material fact that misled Nortek, which thereafter, in reliance thereon, consummated the purchase of the Stock of Webb and did other acts contemplated by the Purchase Agreement.

14. In furtherance of the acts, neglect, omissions and untrue statements of material facts of Defendants referred to herein, Defendants utilized the United States mails, interstate telephone services and other means and instrumentalities of interstate commerce.

15. The acts, neglect, omissions and untrue statements of material facts of Defendants in connection with Nortek's purchase of the Stock of Webb violate *inter alia* Section 10 of the securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder and Section 17(a) of the Securities Act of 1933, as amended.

16. As a result of the acts, neglect, omissions and untrue statements of material facts of Defendants referred to herein, Defendants caused Nortek to be damaged in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest, costs and attorneys' fees.

SECOND CAUSE OF ACTION

Third Party Beneficiary

1. Each and every allegation contained in paragraphs 1 through 13 of the First Cause of Action herein is hereby incorporated by reference, as if fully stated herein.

2. Defendants knew, had reason to know or should have known that the end and aim of the audit for which it was engaged by Sani and Webb was to satisfy a condition to, and facilitate the consummation of, the transactions contemplated by the Purchase Agreement.

3. Defendants held themselves out to the public-at-large and to Nortek, in particular, as qualified certified public accountants and a firm thereof and as experts in accounting matters.

4. Nortek was, and was intended to be, a third party beneficiary of the contractual undertaking by and among Webb, Sani and Grant. Defendants knew, and had reason to know, that Nortek was to be a beneficiary of the services which Defendants were engaged to perform by Sani and Webb and that the end, aim and purpose of the engagement of the services was to enable Sani to sell its Stock of Webb to Nortek and to satisfy Nortek with respect to the conditions contained in the Purchase Agreement.

5. Defendants breached their undertaking to Webb, Sani and to Nortek as third party beneficiary of Defendants' undertakings to Sani and Webb to provide professional services.

6. As a direct and proximate cause of said breach of contract and undertaking, Nortek has been damaged in an amount in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest and costs.

THIRD CAUSE OF ACTION

Gross Neglect

1. Each and every allegation of paragraphs 1 through 13 of the First Cause of Action herein, and paragraph 2 and 3 of the Second Cause of Action herein, is hereby incorporated by reference, as if fully stated herein.

2. The Auditors' Report referred to in paragraph 8 of the First Cause of Action of this Complaint was issued in total and reckless disregard of the obligations of Defendants to Webb, Sani and Nortek, misstated material facts and was so incorrect, false and misleading as to constitute gross negligence and fraud upon Nortek.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest, costs and attorneys' fees.

FOURTH CAUSE OF ACTION

Negligence

1. Each and every allegation of paragraphs 1 through 13 of the First Cause of Action herein and 2 and 3 of the Second Cause of Action herein is incorporated by reference, as if fully stated herein.

2. The issuance of the Auditors' Report referred to in paragraph 8 of the First Cause of Action of this Complaint and the performance by Defendants of services as auditor for Webb, were done in a negligent manner and in breach of the duties owed Nortek in that they failed to disclose the deficiencies and overstatements as set forth in paragraphs 10 and 11 of the First Cause of Action of this Complaint.

3. Nortek relied upon the issuance of the Auditors' Report of Defendants in a manner which was foreseeable and reasonably to be expected by Defendants.

4. As a consequence of the negligence of Defendants, Nortek has been injured and damaged in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest and costs.

FIFTH CAUSE OF ACTION

State Law Violations

1. Each and every allegation of paragraphs 1 through 13 of the First Cause of Action herein is incorporated by reference, as if fully stated herein.

2. The issuance by Defendants of the Auditors' Report referred to in paragraph 8 of the First Cause of Action, with the omissions and misstatements referred to in paragraphs 10 and 11 of the First Cause of Action, constitute a violation of the Securities Laws of the States of New York, Connecticut and Florida.

3. As a consequence of the violations referred to in paragraph 2 hereof, Nortek has been damaged in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, for One Million ($1,000,000) Dollars, plus interest, costs and attorneys' fees.

Plaintiff demands trial by jury.

NORTEK, INC.
By its attorneys,
BERNARD R. POLLOCK,
ADLER, POLLOCK & SHEEHAN
INCORPORATED,
530 Hospital Trust Building,
Providence, Rhode Island 02903
December 6, 1973

Of Counsel:

PAUL, LANDY & BEILEY
341 Pan American Building
Miami, Florida 33131

United States District Court
District of Rhode Island

NORTEK, INC. No. 5384

vs.

ALEXANDER GRANT & COMPANY, A PARTNERSHIP, CHARLES MAURER, BYRON CHERKAS, ROBERT BERGER AND WILLIAM R. METTE, INDIVIDUALLY AND AS PARTNERS OF ALEXANDER GRANT & COMPANY, AND JOHN DOE, ET AL., INDIVIDUALLY AND AS PARTNERS OF ALEXANDER GRANT & COMPANY, AND RALPH RAHMET, A FORMER PARTNER OF ALEXANDER GRANT & COMPANY

Complaint.

This action arises *inter alia* under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and the Securities Act of 1933, as amended, 15 U.S.C. § 77a et seq. and the Rules promulgated thereunder. This Court has jurisdiction under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and under the Securities Act of 1933, as amended, 15 U.S.C. § 77v. Jurisdiction is further founded on diversity of citizenship and amount.

Plaintiff, Nortek, Inc. ("Nortek"), is a Rhode Island corporation having a principal place of business in Cranston, Rhode Island. Defendant, Alexander Grant & Company ("Alexander Grant"), is a partnership of certified public accountants engaged in the practice of accounting with places of business in the States of New York, Illinois, Massachusetts and Florida, and which by its partners, agents and employees, transacts business *inter alia* in the States of Rhode Island and Florida. Defendant, Charles Maurer, is a partner of Alexander Grant at its New York office and is a citizen of a state other than Rhode Island. Defendant, Byron Cherkas, is a partner of Alexander Grant at its Miami office and is a citizen of the State of Florida. Defendant, Robert Berger, is a partner of Alexander Grant at its Boston office and is a citizen of the Commonwealth of Massachusetts. Defendant, William R. Mette, is a partner of Alexander Grant at its Chicago office and is a citizen of the State of Illinois, John Doe, et al., are partners and/or employees of Alexander Grant who are citizens of a state other than Rhode Island. The mattter in controversy exceeds the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

First Cause of Action

Violation of Securities Exchange Act of 1934

1. At all times material hereto, Webb Realty Corp. ("Webb") was a Florida corporation with its principal place of business at Miami, Florida.

2. At all times material hereto, the sole and controlling shareholder of Webb was Sani Distributors, Inc. ("Sani"), a New York corporation with its principal place of business at Miami, Florida.

3. At all times material hereto, controlling shareholders of Sani were Sham G. Sani, a resident of Dade County, Florida; Lal Sani, a resident of New York; and Ishwer Sani, a non-resident of the United States.

4. For a period of time prior to July 3, 1969, Nortek and officers of Sani, including its president, Sham G. Sani, had under discussion the possible acquisition by Nortek of certain securities consisting of all of the stock of Webb ("Stock") and on or about July 3, 1969, entered into an agreement with Sani, which agreement was from time to time amended (hereinafter collectively referred to as "Purchase Agreement") to acquire said Stock upon terms and conditions set forth in the Purchase Agreement at an aggregate price of Six Million ($6,000,000) Dollars.

5. The Purchase Agreement *inter alia* contemplated that Nortek would make a public offering of its securities in the aggregate minimum amount of Ten Million ($10,000,000) Dollars, and the completion of such offering was an express condition of its obligation to close.

6. Section 3.2(a) of the Purchase Agreement required Sani to furnish or cause to be furnished to Nortek *inter alia* such certified financial statements for a registered public offering as may be required under the Securities Act of 1933 and the Rules thereunder for a registrant, as well as certified financial statements set forth in schedules annexed to the Purchase Agreement.

7. In pursuance of the transactions contemplated by the Purchase Agreement, Sani and Webb engaged Alexander Grant, its partners, agents and employees, including Ralph Rahmet, formerly a partner in Alexander Grant, and John Doe, et al. (hereinafter, acting individually or through their partners, employees or agents, "Defendants"), to audit and certify the balance sheet of Webb as of May 31, 1969, so as to

(a) provide Nortek with audited statements upon which it could rely in closing the transaction, and

(b) *inter alia*, enable Nortek otherwise to implement the transactions contemplated by the Purchase Agreement.

8. Thereafter, Defendants, with knowledge of the object, purpose and end for which the audit was to be conducted, did so audit and certify the balance sheet of Webb as of July 3, 1969, and issued a statement with respect thereto (hereinafter "Auditors' Report").

9. Said Auditors' Report contained Alexander Grant's opinion that *inter alia* the balance sheet of Webb as of May 31, 1969, presented fairly the financial position of Webb.

10. At the time of the issuance of the Auditors' Report and at all times material hereto, including December 10, 1969, Defendants knew or had reason to know or should have known that the liabilities of Webb shown on the balance sheet of Webb were understated by an amount not less than Six Hundred Forty-Three Thousand ($643,000) Dollars, and failed to reflect said understatement in the Auditors' Report.

11. As of the time of the issuance of the Auditors' Report and at all times material hereto, including December 10, 1969, Defendants knew or had reason to know or should have known that the retained earnings of Webb stated on the balance sheet of Webb did not fairly present the financial position of Webb since said statement of retained earnings did not reflect the understatement of liabilities and thus overstated retained earnings by an amount not less than Six Hundred Forty-Three Thousand ($643,000) Dollars, and failed to reflect said understatement of liabilities or overstatement of retained earnings in the Auditors' Report.

12. The understatement of liabilities and overstatement of retained earnings by Defendants were made knowingly and intentionally and with the knowledge that the purpose of the Auditors' Report was to induce Nortek to acquire the Stock

of Webb, to pay the purchase price and to do the other acts contemplated by the Purchase Agreement.

13. The Auditors' Report constituted an untrue statement of a material fact that misled Nortek, which thereafter, in reliance thereon, consummated the purchase of the Stock of Webb and did other acts contemplated by the Purchase Agreement.

14. In furtherance of the acts, neglect, omissions and untrue statements of material facts of Defendants referred to herein, Defendants utilized the United States mails, interstate telephone services and other means and instrumentalities of interstate commerce.

15. The acts, neglect, omissions and untrue statements of material facts of Defendants in connection with Nortek's purchase of the Stock of Webb violate *inter alia* Section 10 of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder and Section 17(a) of the Securities Act of 1933, as amended.

16. As a result of the acts, neglect, omissions and untrue statements of material facts of Defendants referred to herein, Defendants, caused Nortek to be damaged in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest, costs and attorneys' fees.

SECOND CAUSE OF ACTION

Third Party Beneficiary

1. Each and every allegation contained in paragraphs 1 through 13 of the First Cause of Action herein is hereby incorporated by reference, as if fully stated herein.

2. Defendants knew, had reason to know or should have known that the end and aim of the audit for which it was engaged by Sani and Webb was to satisfy a condition to, and facilitate the consummation of, the transactions contemplated by the Purchase Agreement.

3. Defendants held themselves out to the public-at-large and to Nortek, in particular, as qualified certified public accountants and a firm thereof and as experts in accounting matters.

4. Nortek was, and was intended to be, a third party beneficiary of the contractual undertaking by and among Webb, Sani and Grant. Defendants knew, and had reason to know, that Nortek was to be a beneficiary of the services which Defendants were engaged to perform by Sani and Webb and that the end, aim and purpose of the engagement of the services was to enable Sani to sell its Stock of Webb to Nortek and to satisfy Nortek with respect to the conditions contained in the Purchase Agreement.

5. Defendants breached their undertaking to Webb, Sani and to Norteck as third party beneficiary of Defendants' undertakings to Sani and Webb to provide professional services.

6. As a direct and proximate cause of said breach of contract and undertaking, Nortek has been damaged in an amount in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Norteck demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest and costs.

THIRD CAUSE OF ACTION

Gross Neglect

1. Each and every allegation of paragraphs 1 through 13 of the First Cause of action herein, and paragraph 2 and 3 of the Second Cause of Action herein, is hereby incorporated by reference, as if fully stated herein.

2. The Auditors' Report referred to in paragraph 8 of the First Cause of Action of this Complaint was issued in total and reckless disregard of the obligations of Defendants to Webb, Sani and Nortek, misstated material facts and was so incorrect, false and misleading as to constitute gross negligence and fraud upon Nortek.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest, costs and attorneys' fees.

FOURTH CAUSE OF ACTION

Negligence

1. Each and every allegation of paragraphs 1 through 13 of the First Cause of Action herein and 2 and 3 of the Second Cause of Action herein is incorporated by reference, as if fully stated herein.

2. The issuance of the Auditors' Report referred to in paragraph 8 of the First Cause of Action of this Complaint and the performance by Defendants of services as auditor for Webb, were done in a negligent manner and in breach of the duties owed Nortek in that they failed to disclose the deficiencies and overstatements as set forth in paragraphs 10 and 11 of the First Cause of Action of this Complaint.

3. Nortek, having exercised due care, relied upon the issuance of the Auditors' Report of Defendants in a manner which was foreseeable and reasonably to be expected by Defendants.

4. As a consequence of the negligence of Defendants, Nortek has been injured and damaged in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, in the amount of One Million ($1,000,000) Dollars, plus interest and costs.

FIFTH CAUSE OF ACTION

State Law Violations

1. Each and every allegation of paragraphs 1 through 13 of the First Cause of Action herein is incorporated by reference, as if fully stated herein.

2. The issuance by Defendants of the Auditors' Report referred to in paragraph 8 the First Cause of Action, with the omissions and misstatements referred to in paragraphs 10 and 11 of the First Cause of Action, constitute a violation of the Securities Laws of the States of New York, Connecticut and Florida.

3. As a consequence of the violations referred to in paragraph 2 hereof, Nortek has been damaged in excess of Six Hundred Forty-Three Thousand ($643,000) Dollars.

WHEREFORE, Nortek demands judgment against Alexander Grant and its partners, jointly and severally, for One Million ($1,000,000) Dollars, plus interest, costs and attorneys' fees.

Plaintiff demands trial by jury.

NORTEK, INC.
By its attorneys,
BERNARD R. POLLOCK,
ADLER, POLLOCK & SHEEHAN
INCORPORATED,
530 Hospital Trust Building
Providence, Rhode Island 02903
December 6, 1973

In the United States District Court for the Southern District of Florida Miami Division

NORTEK, INC.,

PLAINTIFF,

vs.

ALEXANDER GRANT & COMPANY ET AL., No. 73-1866 Civ. WM

DEFENDANTS,

SANI DISTRIBUTORS, INC.

THIRD-PARTY
DEFENDANTS.

Pre-Trial Stipulation.

1. *Nature of Action*: The Complaint is one in five counts brought by Nortek, Inc. (Nortek) against Alexander Grant & Company (Grant) and certain present or former partners thereof. The Complaint alleges that the financial statements of Webb Realty Corporation (Webb) at May 31, 1969, examined and reported on by Grant, understated certain deferred tax liabilities and overstated the retained earnings of Webb to the damage of plaintiff. Said action is for damages under the Securities Exchange Act of 1934 Section 10b and Rule 10b-5

promulgated thereunder and Section 17a of the Securities Act of 1933 based on an allegation of an untrue statement of material fact by the defendants in their report on the financial statements of Webb Realty Corporation, and for violating state securities laws, breach of contract and for negligence and gross neglect in their report on the financial statements of Webb. The Answer denies the allegations of the Complaint and states affirmative defenses based on release, laches, statute of limitations, no damages, no reliance on Grant's report and absence of privity of contract. The Third-Party Complaint states that third-party defendant is liable to the defendants in the event of recovery by the plaintiff by reason of unjust enrichment, conspiracy and breach of warranty. The Counterclaim to the Third-Party Complaint alleges failure of consideration.

2. *Basis of Federal Jurisdiction*. Federal jurisdiction is conferred by plaintiff's claim alleging violation of the Securities Exchange Act of 1934, 15 USC 78a et seq. and the Securities Act of 1933 as amended, 15 USC Section 77a et seq. and the rules promulgated thereunder. Jurisdiction is further predicated upon the diversity of citizenship between the plaintiff, a Rhode Island corporation and the defendants who are citizens of states other than the State of Rhode Island, all pursuant to 28 U.S.C. Section 1332.

3. *Pleadings Raising the Issues*: The pleadings which raise the issues are:

(a) the complaint
(b) defendants' answer
(c) third-party complaint against Sani Distributors, Inc. and amendment to third-party complaint against Sani Distributors, Inc.
(d) answer and counterclaim of Sani Distributors, Inc.

4. *Undisposed motions or other matters requiring action by the Court*:

4.1 Defendants' Motion for summary judgment.
4.2 Defendants' Motion to serve third-party complaint.
4.3 Plaintiff's Supplementary Interrogatories.
4.4 Defendants' Supplementary Interrogatories.

5. *Statement of Stipulated Facts which will Require No Proof at Trial*: Each party reserves the right to adduce such additional testimony or proof related to such facts as may be otherwise advisable in the orderly and complete presentation of their respective cases and with respect to which each party further reserves the right to object to the admission of such facts on substantive grounds including but not limited to relevancy and materiality.

5.1 Nortek is a Rhode Island corporation which until January 24, 1971 had its principal place of business in Providence, Rhode Island and since that date had its principal place of business at 815 Reservoir Avenue, Cranston, Rhode Island.

5.2 Grant is a partnership of certified public accountants engaged in the practice of accounting with offices in several states including New York and Florida.

5.3 The defendant Charles Maurer was at all times material hereto a certified public accountant licensed in the State of New York and a partner of Grant in its New York office.

5.4 The defendant Ralph Rehmet was, at all times material hereto, a certified public accountant licensed in the State of New York and until August of 1971 a partner of Grant in its New York office.

5.5 At all times material hereto Webb was a Florida corporation with its principal place of business at Miami, Florida.

5.6 At all times material hereto from January of 1969 to December 10, 1969 the sole and controlling shareholder of Webb was Sani Distributors, Inc. (Sani) a New York corporation.

5.7 At all times material hereto until December 1972 the controlling shareholders of Sani were Sham G. Sani a resident of Dade County, Florida, Lal Sani, a resident of New York, and Ishwer Sani, a non-resident of the United States.

5.8 During the period prior to July 3, 1969, Nortek and officers of Sani, including Sham G. Sani, discussed the possible purchase of the Webb group by Nortek.

5.9 At all times material hereto the Stock of Webb constituted a security within the meaning of Section 3 of the Securities Exchange Act of 1934, 15 U.S.C. 78c and Section 2 of the Securities Act of 1933, as amended, 15 U.S.C. 77b, and Rules promulgated pursuant thereto.

5.10 The Webb Group — a group of companies comprised of Webb Realty Corporation, Webb Realty Associates, Inc., Interlachen Lakes Estates, Inc., St. Johns Hills, Inc. and St. Johns Riverside Estates, Inc. (subsidiary of St. John Hills, Inc.) with their principal places of business in Florida.

5.11 Nortek Properties, Inc. — a corporation formed by Nortek in 1971 to hold the Stock of Webb and the Webb Group.

5.12 Profit Properties A, Inc. — the purchaser of the Stock of Nortek Properties, Inc. from Nortek.

5.13 The individuals named hereinafter had, at all times material hereto, the affiliations and professions described.

5.13.1 Arthur Andersen & Company — a firm of certified public accountants with offices within the State of Florida.

5.13.2 Auchincloss, Parker & Redpath — a firm of investment bankers.

5.13.3 Robert C. Bednar — a tax senior in Arthur Andersen & Compnay and a certified public accountant licensed to practice with the State of Florida.

5.13.4 Cherkes, Rapaport & Crair — a firm of certified public accountants licensed to practice under the laws of the State of Florida with offices in Miami, Florida until September 1, 1969 with respect to which during the period June 1, 1969 to September 1, 1969 was affiliated with Grant.

5.13.5 Cummings & Lockwood — a law firm with principal offices in the City of Stamford, State of Connecticut, and counsel to Nortek.

5.13.6 Patrick C. Dressler, Esq. — a partner with the firm of Cummings & Lockwood until 1970.

5.13.7 Ivan Faggen — a manager with Arthur Andersen & Company and certified to practice as a public accountant in the State of Florida.

5.13.8 Harvey Goldberg — a former member of the firm of Cherkes, Rapaport & Crair and since September 1, 1969 an employee of Grant and a certified public accountant licensed to practice within the State of Florida.

5.13.9 David B. Hiley — an associate with primary duties in corporate finance and investment banking with the investment banking firm of Auchincloss, Parker & Redpath with offices in the City of New York.

5.13.10 George Hill — a partner with Arthur Andersen & Company and the engagement partner responsible for Nortek.

5.13.11 David Kline — a former partner with the firm of David Stuzan & Company and since September 1, 1969 an employee of Grant and a certified public accountant licensed to practice within the State of Florida.

5.13.12 Joel Levy — a former partner with David Stuzan & Company, and a certified public accountant licensed to practice within the State of Florida.

5.13.13 S. Philip Malspeis, Esq. — a partner with the law firm of Malspeis, Lococo, Brown & Schwartz, P.A. attorneys for Webb, Sani and Sham Sani.

5.13.14 Ralph Papitto — President of Nortek.

5.13.15 James R. Powell — an audit manager in Arthur Andersen & Company and a certified public accountant licensed to practice with the State of Florida.

5.13.16 Leonard Rapaport — a partner of the firm of Cherkes, Rapaport & Crair and since September 1, 1969 a partner of Grant and a certified public accountant licensed to practice within the State of Florida.

5.13.17 Richard Rose, Esq. — a partner with the firm of Cummings & Lockwood.

5.13.18 Howard Seiden — a partner with the firm of Grant with principal offices in the City of New York.

5.13.19 Michael Smith — an audit manager in Arthur Andersen & Company and a certified public accountant licensed to practice with the State of Florida.

5.13.20 Robert Spears — a certified public accountant and chief financial officer for Nortek from February, 1969 to March, 1971.

5.13.21 Spear, Sheldon, Safer & Co. — a firm of certified public accountants licensed to practice within the State of Florida and having offices in Miami.

5.13.22 Herman Steiner — President of Profit Properties A, Inc.

5.13.23 David Stuzan & Company — a firm of certified public accountants with offices in Miami, Florida until September 1, 1969 which during the period June 1, 1969 to September 1, 1969 was affiliated with Grant.

5.13.24 Donald Tollefson — a partner in Arthur Andersen & Company and the managing partner and audit partner at Miami assigned to the Webb Group and to the Webb account for the year end December 31, 1970 audit.

5.13.25 Wayne Ulsh — controller for Nortek and then its vice president and treasurer from March, 1971 to March of 1974.

5.13.26 Charles Wilson — a former partner with Spear, Sheldon, Safer & Co. and for the period January, 1970 to March, 1972 controller for the Webb group and a certified public accountant licensed to practice within the State of Florida.

5.13.27 Lawrence Winkler — a former partner with the firm of David Stuzan & Company and a certified public accountant licensed to practice within the State of Florida.

5.14 Ralph Rehmet had knowledge at the time of the engagement of Grant on June 19, 1969, to make an examination of the financial statements of Webb Realty Corporation as of May 31, 1969, that the shareholders of the Webb Group were negotiating with Nortek with respect to the possible purchase of said companies by Nortek and that in the event of a purchase of the aforementioned companies Webb desired that the report of Grant with respect to the combined balance sheet at May 31, 1969 and the combined statement of earnings and retained earnings for the years ended May 31, 1969 would be used in connection with a registration statement of an acquiring company and that subsequent to July 3, 1969, Ralph Rehmet also had knowledge that Nortek had entered into agreements on July 3, 1969 with the selling shareholders of the Webb group to purchase shares of the companies of the Webb group.

5.15 Charles Maurer had knowledge prior to July 3, 1969 that the shareholders of Webb group were negotiating with Nortek for the purchase of said companies by Nortek and that in the event of a purchase of the aforementioned companies

Webb desired that the report of Grant with respect to the combined balance sheet at May 31, 1969 and the combined statement of earnings and retained earnings for the years ended May 31, 1969 would be used in connection with a registration statement of an acquiring company and that subsequent to July 3, 1969 Charles Maurer also had knowledge that Nortek had entered into agreements on July 3, 1969 with the selling shareholders of the Webb group to purchase shares of the companies of the Webb group.

5.16 Alexander Grant & Company had knowledge at the time of the engagement of Grant on June 19, 1969, to make an examination of the financial statements of Webb Realty Corporation as of May 31, 1969, that the shareholders of the Webb group were negotiating with Nortek with respect to the possible purchase of said companies by Nortek and that in the event of a purchase of the aforementioned companies Webb desired that the report of Grant with combined statement of earnings and retained earnings for the years ended May 31, 1969 would be used in connection with a registration statement of an acquiring company and that subsequent to July 3, 1969 Alexander Grant & Company also had knowledge that Nortek had entered into agreements on July 3, 1969 with the selling shareholders of the Webb group to purchase shares of the companies of the Webb group.

5.17 Grant was paid not less than $100,932.50 for the performance of certain services, including the examination of financial statements of the Webb group as of May 31, 1969.

5.18 Ralph Rehmet had knowledge after July 3, 1969, prior to issuance of Grant's report on the combined financial statements of the Webb group as of May 31, 1969 that Nortek would use said financial statements and its report with respect thereto for the purpose of confirming financial information provided to Nortek by the selling shareholders of the Webb group on a combined basis.

5.19 Charles Maurer had knowledge after July 3, 1969 prior to issuance of Grant's report on the combined financial statements of the Webb group as of May 31, 1969 that Nortek would use said financial statements and its report with respect thereto for the purpose of confirming financial information provided to Nortek by the selling shareholders of the Webb group on a combined basis.

5.20 Alexander Grant & Company had knowledge after July 3, 1969 prior to issuance of Grant's report on the combined financial statements of the Webb group as of May 31, 1969 that Nortek would use said financial statements and its report with respect thereto for the purpose of confirming financial information provided to Nortek by the selling shareholders of the Webb group on a combined basis.

5.21 The financial statements for Webb Realty Corporation examined and reported on by Grant were furnished by Grant to Nortek on or about August, 1969 subsequent to July 3, 1969 and prior to december 10, 1969.

5.22 Prior to issuing its report on the financial statements of Webb Realty Corporation, Alexander Grant, Ralph Rehmet and Charles Maurer had knowledge that for fiscal years prior to February 28, 1967 Webb Realty Corporation had been a Subchapter S corporation.

5.23 Deleted.

5.24 Stephen E. Pascarella is a certified public accountant duly licensed to practice under the laws of the State of Rhode Island.

5.24.1 Howard Groveman is a certified public accountant duly licensed to practice under the laws of the State of New York.

5.24.2 Charles A. Werner is a certified public accountant duly licensed to practice under the laws of the State of Illinois.

5.24.3 Charles Maurer is a certified public accountant duly licensed to practice under the laws of the State of New York.

5.24.4 Ralph A. Rehmet is a certified public accountant duly licensed to practice under the laws of the State of New York.

5.25 The purchase agreement between Sani and Nortek was executed in the State of Florida.

5.26 The transactions contemplated by the purchase agreement with respect to the sale of the stock of Webb to Nortek were commenced on December 10, 1969 and were completed on December 19, 1969, in Miami, Florida.

5.27 Webb Realty Corporation and Grant entered into an agreement with respect to which Grant was engaged and said agreement was evidenced by an engagement letter dated June 19, 1969. Said agreement was signed in Florida by Sham Sani on behalf of Webb.

5.28 Grant completed its field work with respect to said engagement on July 3, 1969 and the reports on the financial statements of the Webb group were issued as of that date.

5.29 Nortek acquired the stock of Sani Distributors from Sham Sani and other shareholders of Sani Distributors pursuant to an agreement dated September 28, 1972.

5.30 Nortek prepared various pro forma financial statements summarizing financial information provided by selling shareholders of Webb group, copies of which have not been located by Plaintiff.

5.31 Touche Ross & Co. reported on the financial statements of Nortek for the year ended December 31, 1969, and said financial statements did not contain deferred taxes for Webb for a period prior to May 31, 1964 and the balance sheet did not include deferred income taxes with respect to income accrued on installment contracts entered into by Webb prior to December 31, 1964.

5.32 Delete.

5.33 As of July 3, 1969, Nortek had not received any of the financial statements examined by Grant for any of the Webb group of companies, Webb Realty Corporation or the combined Webb group.

5.34 Prior to July 3, 1969, Nortek and Papitto had copies of financial reports for Webb which were prepared by the accounting firm of Spear, Sheldon, Safer and Co. for the period ending February 28, 1969.

5.35 Delete.

5.36 Delete.

5.37 Delete.

5.38 Defendant Grant examined the books and records of Webb Realty Corporation and the other companies in the Webb group in Florida.

5.39 J.V. Enterprises, Inc., a Rhode corporation, is a wholly-owned subsidiary of Nortek.

5.40 Sani Distributors, Inc., was merged into J.V. Enterprises, Inc. on July 31, 1973 pursuant to R.I.G.L. 7-1.1.70.

5.41 At all times material hereto Ralph Rehmet and Charles Maurer were partners of, and agents for Alexander Grant & Co.

6. *Concise Statements of Facts not to be Contested at Trial*: None.

7. *Issues of Fact to be Litigated*:

7.1 Whether Grant was negligent in issuing its report with respect to the balance sheet of Webb as of May 31, 1969 and the related statements of income and retained earnings for the three years then ended by reason of the fact that the balance sheet of Webb did not include an amount for deferred income taxes with respect to income accrued on installment contracts entered into prior to May 31, 1964.

7.2 Whether Grant was negligent in issuing its report with respect to the balance sheet of Webb as of May 31, 1969 and the related statements of income and retained earnings for the

three years then ended by reason of the fact that the balance sheet of Webb as of May 31, 1969 recorded an amount of retained earnings of $2,200,427.

7.3 Whether Grant was negligent in issuing its report on the financial statements of Webb as of May 31, 1969 and the related statements of income and retained earnings for the three years then ended in stating that in its opinion the balance sheets and statements of income and retained earnings present fairly the financial position of Webb and the results of its operations for the three years then ended and were in conformity with generally accepted accounting principles applied on a consistent basis.

7.4 Whether Nortek intended to rely or relied on the report of Grant with respect to the balance sheet of Webb as of May 31, 1969 and the related statements of income and retained earnings for the three years then ended in entering into its contract on July 3, 1969.

7.5 Whether Nortek knew or should have known that the balance sheet of Webb as of May 31, 1969 and the related statements of income and retained earnings for the three years then ended reported on by Grant did not include an amount for deferred income taxes with respect to income accrued on installment contracts entered into prior to May 31, 1964.

7.6 Whether Nortek intended to rely or relied on Grant's report on the combined Webb group of companies to confirm the information it had received from the selling shareholders of the Webb group prior to July 3, 1969.

7.7 Whether the amount of retained earnings of Webb was material to the purchase by Nortek of Webb.

7.8 Whether the selling shareholders of the Webb group furnished Nortek with information prior to July 3, 1969, that the net worth of the Webb group as of May 31, 1969 was $3.25 million.

7.9 If issue 7.8 is found in the affirmative, whether Nortek relied on information furnished by selling shareholders of the Webb group in entering into its contract of July 3, 1969.

7.10 Whether the net worth of the Webb group and Webb Realty Corporation shown on the financial statements reported on by Grant exceeded a net worth that Nortek anticipated upon entering into its contract to purchase Webb on July 3, 1969.

7.11 Whether Grant had a right to rely on the representation of Webb with respect to its examination of their report on the financial statements of Webb.

7.12 Whether any act or omission of Grant constituted gross negligence.

7.13 Whether Nortek would have acted differently if the alleged omission or misstatement had not occurred.

7.14 Whether the contract between Grant and Webb expressed an intention to primarily and directly benefit Nortek.

7.15 Whether Grant had any obligations to Nortek with respect to said contract that Grant breached and whether the damages suffered by reason of said breach of contract were foreseeable.

7.16 Whether Grant's report with respect to the balance sheet of Webb as of May 31, 1969 and the related statements of income and retained earnings for the three years then ended contained any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and whether Grant had knowledge of said untrue statement of a material fact or omission to state a material fact at the time it issued its report.

7.17 Whether Nortek failed to, or was negligent in, asserting its claim against Grant for an unreasonable length of time and whether defendants were prejudiced thereby.

7.18 Whether Nortek released Sani Distributors, Inc.

7.19 Whether Nortek suffered any damages by reason of the alleged failure of the defendants fully to provide for deferred federal income taxes of Webb alleged by Nortek to be $640,000 and whether Nortek may recover interest in respect to said damages from December 31, 1970.

7.19.2 Whether the report of Grant was the proximate cause of any damages suffered by Nortek.

7.19.3 As to its Counterclaim to the Third Party Complaint of Grant, whether there has been a total failure of consideration in respect of said payment to the third party plaintiffs and Sani Distributors may be subject to further costs and expenses in an amount not readily ascertainable for which it is entitled to reimbursement.

7.19.4 As to the Third Party Complaint, whether Grant is entitled to recover against Sani Distributors and J.V. Enterprises, Inc. the amount of any recovery by Nortek.

7.20 Whether Sani Distributors, Inc. and J.V. Enterprises, Inc. were unjustly enriched as a result of and to the extent of having received an amount in excess of that amount it would have received but for the allegedly misleading financial reports of Webb.

7.21 Whether on or about November 10, 1971, Nortek Sani Distributors and Sham G. Sani conspired between themselves and secretly agreed that Nortek would release and hold Sani Distributors harmless from any liability which might arise out of alleged error in the Webb balance sheet included in the Alexander Grant report and would assert its claim against Grant for such alleged obligation of Sani Distributors to Nortek in consideration for the agreement of Sani Distributors to amend the July 3, 1969 purchase agreement by extending the time within which Nortek could make the payments due to Sani Distributors.

7.22 Whether representations and warranties of Webb made to Grant induced Grant to report on the financial statements of Webb.

7.23 Whether Sani is liable to Grant for breach of said representations and warranties.

7.24 Whether at the time Grant issued its report on the balance sheet of Webb Realty Corporation, Alexander Grant, Ralph Rehmet and Charles Maurer had determined that deferred taxes for the period prior to May 31, 1964 were not required to be shown on the financial statements of Webb Realty Corporation and therefore Grant, Rehmet and Maurer had knowledge that said balance sheet did not include deferred income taxes with respect to income accrued on installment contracts entered into prior to May 31, 1964.

7.25 Whether the purchase of Webb Realty Corporation by Nortek was integral to and a part of the purchase of the Webb group of companies by Nortek pursuant to contracts entered into on July 3, 1969 for the total purchase price of $22 million.

7.26 Whether deferred income tax in the February 28, 1969 financial statement prepared by Spear, Sheldon, Safer & Co. was overstated or that the amount shown as stockholders' equity and net worth in said financial statements was understated.

7.27 Whether prior to July 3, 1969, Nortek and Papitto had in their possession the typed document attached to and identified as Exhibit 1 to the Deposition of Sham G. Sani.

7.28 Whether prior to July 3, 1969, Nortek had information that the figure for net worth as of May 31, 1969 shown in the February 28, 1969 financial statement prepared by Spear, Sheldon, Safer & Co. was understated except for accrued income for the period March 1, 1969 to May 31, 1969.

8. *A Concise Statement of Issues of Law on Which There is Agreement*: None.

9. *A Concise Statement of Issues at Law which Remain for Determination by the Court*. The parties recognize that the following legal issues are raised either by the pleadings or by the stipulated facts, or issues of fact to be litigated:

9.1.1 Whether Florida conflicts of law principles dictate the application of Florida or Rhode Island law to the causes of action sounding in tort.

9.1.2. Whether, if the Court concludes on the application of Florida substantive law as to causes of action sounding in tort, that law will permit recovery by a foreseeable reliant party not in privity with an accountant for the negligent act of the accountant.

9.1.3 Whether Florida conflicts of law principles dictate the application of Florida law, or the law of some other forum to issues raised by Plaintiff's Second Cause of Action Third Party Beneficiary.

9.1.4 Whether Florida conflicts of law principles dictate the application of Rhode Island, Florida or the law of some other forum to the issues raised by Defendants' First Affirmative Defense — Release.

9.1.5 Whether Defendant's are liable to Nortek pursuant to the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated pursuant thereto with respect to the omissions alleged in the First Cause of Action without a showing by Nortek of reliance on the auditor's report identified therein.

9.1.6 Whether Defendants are liable to Nortek pursuant to the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated pursuant thereto with respect to the omissions alleged in the First Cause of Action without a showing by Nortek of the knowledge of Defendants of the omissions.

9.1.7 Whether Section 10b of the Securities Exchange Act and Rule 10b-5 have been violated.

9.1.8 Whether Section 17a of the Securities Act of 1933 has been violated.

9.1.9 Whether the Florida Securities Act has been violated.

9.1.10 Whether any of the claims are barred by the statutes of limitations.

9.1.11 Whether Nortek was entitled to rely on Grant's report on Webb in entering into its contract of July 3, 1969.

9.1.12 Whether Nortek is a third party beneficiary with respect to the contract between Webb Realty Corporation and Grant dated June 19, 1969.

9.1.13 Whether Nortek's acquisition of the stock of Sani Distributors, Inc. constitutes a release of any cause of action against Sani Distributors, Inc.

9.1.14 Whether release of Sani Distributors, Inc. constitutes a release of Grant.

9.1.15 Whether the amendments to the contract between Sani Distributors and Nortek constitutes a release of Grant.

9.1.16 Whether doctrine of laches is a bar to the claims herein.

9.1.17 Whether defendants are entitled to recover the amount of any judgment entered against them in this cause from Sani Distributors or J.V. Enterprises pursuant to the doctrine of unjust enrichment.

9.1.18 Whether defendants are entitled to recover the amount of any judgment entered against them in this cause from Sani Distributors or J.V. Enterprises as a result of a conspiracy between Sani Distributors and Nortek wherein Nortek agreed to release Sani Distributors and assert its claim against defendants in return for Sani Distributor's agreement to extend the time within which Nortek could make the payments due to Sani Distributors.

9.1.19 Whether defendants are entitled to recover the amount of any judgment entered against them from Sani or J.V. Enterprises as a result of the breach of certain representations and warranties made to Grant with respect to Webb's books and records.

9.1.20 Whether in order to recover under the Securities Act, plaintiff must prove that the financial statements reported on by Grant were materially misleading, that Grant knew that the financial statements were misleading, that plaintiff relied upon Grant's report and that the plaintiff suffered damages as a result of such reliance.

10. *Trial exhibits* — see annexed schedules. As to said schedules, the parties each reserve rights to object to the admissibility of said exhibits, provided, however, that no objection as to authenticity shall be made except within 15 days of the date hereof.

11. *List of Witnesses* — see annexed schedule.

12. *Estimated Trial Time* — 5-7 days.

MISCELLANEOUS.

Expert witness summaries as annexed.

For the Plaintiff, Nortek, Inc., and Third Party Defendant, Cross-Claimant, Sani Distributors, Inc.

JOHN H. BOMSTER
GEORGE L. CHIMENTO
ADLER, POLLOCK & SHEEHAN INCORPORATED
530 Hospital Trust Building
Providence, Rhode Island 02903

Of Counsel:

PAUL, LANDY & BEILEY
Penthouse — Greater Miami Federal Building
Miami, Florida 33131

For the Defendants and Third Party Plaintiffs and Cross-Defendants Alexander Grant & Company, et al.

ROBERT L. PARKS
PODHURST, ORSECK & PARKS, P.A.
66 W. Flagler Street
Miami, Florida 33130

Of Counsel:

HOWARD KASTEL,
ALTHEIMER, GRAY, NAIBURG & STRAUSBURGER
1 IBM Plaza
Chicago, Illinois

In the United States District Court for the Southern District of Florida.

NORTEK, INC.,
PLAINTIFF,

vs. CASE NO. 73-1866-CIV-WM

ALEXANDER GRANT & COMPANY, ET AL.,
DEFENDANTS,

vs.

SANI DISTRIBUTORS, INC. AND
J.V. ENTERPRISES, INC.,
THIRD-PARTY DEFENDANTS.

Findings of Uncontested Fact, Conclusions of Law and Order.

This cause comes before the Court upon the Motion of Defendants, Alexander Grant & Company, Charles Maurer, Byron Cherkas, Robert Berger, William R. Mette and Ralph A. Rehmet for summary judgment in the Defendants' favor dismissing the action. The Court, having fully considered the briefs and arguments of the parties and being fully advised in the premises, is of the opinion that there is no genuine issue as to any material fact, and that the Defendants are entitled to

judgment as a matter of law. The Court, therefore, finds that the uncontested facts and the conclusions of law applicable thereto are as follows:

FINDINGS OF UNCONTESTED FACT

1. This action arises out of Nortek Inc.'s (Plaintiff) purchase of all the common stock of Webb Realty Corporation (Webb) from Sani Distributors, Inc. (Sani) in 1969.

2. Webb is a Florida corporation with its principal place of business in Florida and its engaged in buying and selling Florida real estate.

3. Sani is a New York corporation with its principal place of business in Florida.

4. Plaintiff is a Rhode Island corporation with its principal place of business in Rhode Island.

5. The Complaint was filed in this Court on December 8, 1973 naming Alexander Grant & Company (Alexander Grant), a partnership engaged in the practice of accounting, and certain individuals, all of whom are present or former partners in Alexander Grant, as Defendants.

6. The Complaint contains five counts, each of which alleges that financial statements prepared by the Defendants contained untrue statements of material fact and that Plaintiff relied upon the untrue statements to its detriment in its purchase of Webb. The five counts are based on: (1) Section 10b of the Securities Exchange Act of 1934 and Section 17a of the Securities Act of 1933; (2) the contract between Alexander Grant and Webb for the performance of the audit; (3) common law gross negligence; (4) common law ordinary negligence; and (5) the state securities laws of Connecticut, New York and Florida; respectively.

7. Defendants' Answer denies the material allegations of the Complaint and asserts affirmative defenses, including statute of limitation, release and failure to state a cause of action.

8. Defendants filed Third-Party Complaints against Sani and J.V. Enterprises, Inc. alleging that if Defendants are liable to Plaintiff then Third-Party Defendants are liable to Defendants.

9. Alexander Grant was retained to audit and report upon the financial statements of Webb and four other companies which comprise the Webb Group pursuant to a letter agreement which was dated June 19, 1969 and was executed in Florida. The letter agreement did not state that Alexander Grant's audit report would be used as a basis for negotiating the terms of Plaintiff's purchase of the Webb Group and did not express an intention to primarily or directly benefit Plaintiff. Alexander Grant issued its report on Webb's financial statements subsequent to July 3, 1969.

10. Plaintiff simultaneously entered into contracts to purchase and purchased each of the five related companies comprising the Webb Group. Each of the contracts was executed in Florida on July 3, 1969. The total purchase price for the Webb Group was twenty-two million dollars. Six million dollars was paid with respect to the purchase of Webb. Pursuant to said contracts, the selling shareholders were to furnish to Plaintiff certified financial statements. The selling shareholders fulfilled this contractual obligation by providing Plaintiff with Alexander Grant's reports. The transactions contemplated by the contracts were commenced on December 10, 1969 and completed on December 19, 1969 in Florida.

11. Prior to July 3, 1969, Plaintiff received unaudited financial statements with respect to both Webb and the Webb Group. The net worth of Webb shown in the financial statements reported on by Alexander Grant exceeded the figure for

net worth shown on the unaudited financial statements by more than the alleged $643,000 overstatement contained in the Alexander Grant reports.

12. Subsequent to discovery of the alleged discrepancy, Sani agreed to extend the maturity date of certain indebtedness. Also subsequent to discovery of the alleged discrepancy, Plaintiff executed a letter holding Sani harmless from alleged liability and thereafter agreed that Plaintiff had no defenses or set-offs with respect to its obligations to Sani arising out of its purchase of the Webb Group. Prior to the filing of this action, Plaintiff acquired Sani and merged Sani into Plaintiff.

Conclusions of Law

1. This Court has jurisdiction of the parties to, and the subject matter of, this action.

2. The two year statute of limitations contained in Section 517.21 of the Florida blue sky laws is applicable to and bars the claims in Count I of the Complaint, alleging violations of Section 10b of the Securities Exchange Act of 1934 and Section 17a of the Securities Act of 1933. *Hudak* v. *Economic Research Analysts*, 499 F. 2d 996 (5th Cir. 1974); *O'Connell* v. *Economic Research Analysts*, 499 F. 2d 994 (5th Cir. 1974); and *Josef's of Palm Beach* v. *Southern Investment Co.*, 349 F. Supp. 1057 (S.D. Fla. 1972).

3. The two year statute of limitations contained in Section 517.21 of the Florida blue sky laws is applicable to and bars the claim in Count V of the Complaint, alleging violations of the Florida securities laws.

4. The two year limitations period contained in Section 36-346 of the Connecticut Statutes is applicable to and bars the

claim in Count V of the Complaint, alleging violations of the Connecticut securities laws.

5. On the basis of the uncontested facts, the New York securities laws are inapplicable.

6. Florida law is applicable to the interpretation of the contract upon which Plaintiff relies, with respect to allegations of negligence and gross negligence, and with respect to the defense of release. *Charles L. Bowman & Company* v. *Erwin*, 468 F. 2d 1293 (5th Cir. 1972); *Colhoun* v. *Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. Sup. Ct. 1972); *Nelson* v. *Browning*, 391 S.W. 2d 873 (Sup. Ct. Mo. 1965); *Bittner* v. *Little*, 270 F. 2d 286 (3rd Cir. 1959); *Lindsey* v. *Chicago, B & Q R. Co.*, 226 F. 23 (7th Cir. 1915); *Garlock* v. *New York Tree Savers, Inc.*, 199 F. Supp., 59 (W.D.N.Y. 1961); and *Restatement 2nd, Conflict of Laws*, Section 170.

7. On the basis of the uncontested facts, Plaintiff is not a third-party beneficiary to the contract between Alexander Grant and Webb. That contract does not express an intention to primarily or directly benefit Plaintiff, and such an intention is not manifest from the nature of that contract. *American Empire Insurance Co.* v. *Fidelity and Deposit Co.*, 408 F. 2d 75 (5th Cir. 1969); *Bryant* v. *Cole*, 282 So. 2d 652 (Fla. App. 1973); and *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, [1973-1974 Transfer Binder] CCH Fed. Sec. Law Rptr. Para. 94, 574 (S.D.N.Y. 1974).

8. On the basis of the uncontested facts, Plaintiff released Sani from any liabiiity with respect to the alleged deficiency and said release as a matter of law bars an action against the Defendants for negligence. *Davidow* v. *Seyfarth*, 58 So. 2d 86 (Fla. Sup. Ct. 1952); *Roper* v. *Florida Public Utilities Co.*, 179 So. 904 (Fla. Sup. Ct. 1938); *Louisville & N.R. Co.* v. *Allen*, 65 So. 8 (Fla. Sup. Ct. 1915); *Fiener's Organization* v. *California*, 77 So. 2d 852 (Fla. Sup. Ct. 1955); *Flowers* v.

Miskoff, 233 So. 2d 201 (Fla. App. Ct. 1970), *cert. den.*, 238 So. 2d 106 (Fla. Sup. Ct. 1970).

9. On the basis of the uncontested facts, in absence of the existence of a contractual relationship between Plaintiff and Defendants, Defendants' duty of due care did not extend to Plaintiff and Defendants are not liable to Plaintiff. The alleged deficiencies with respect to deferred income taxes were not material to or relied upon with respect to the transaction between Plaintiff and Sani, and did not, as a matter of law, constitute fraud or gross negligence. *Investment Corporation of Florida* v. *Buchman*, 208 So. 2d 291 (Fla. App. Ct. 1968), *cert. dism'd.* 216 So. 2d 748 (Fla. Sup. Ct. 1968).

Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1) That Defendants' Motion for Summary Judgment is granted;

2) That Plaintiff take nothing by its Complaint;

3) That Defendants go hence without day; and

4) That Defendants recover of Plaintiff their costs of suit.

ENTER: WILLIAM O. MEHRTENS
United States District Judge

DATED: November 15, 1974

FILED
DEC 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-630

NORTEK, INC.,
Petitioner,

v.

ALEXANDER GRANT & COMPANY, et al.,
Respondent,

v.

SANI DISTRIBUTORS, INC., et al.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD L. KASTEL
RONALD J. SKLAR
JEFFREY H. VERBIN
ROBERT L. PARKS
Attorneys for Defendants-Appellees

ALTHEIMER & GRAY
Chicago, Illinois

PODHURST, ORSECK & PARKS, P.A.
Miami, Florida
Of Counsel

CHAS. P. YOUNG-CHICAGO

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NORTEK, INC.,
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SANI DISTRIBUTORS, INC., et al.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

This case arises out of the purchase by petitioner for 22 million dollars of a number of related corporations known as the "Webb Group". For tax purposes, separate contracts were simultaneously executed for the purchase of each of the companies in the Group. Prior to the execution of these contracts, the selling corporations had retained Alexander Grant & Company (Grant) to audit and certify their financial statements. At the time the purchase contracts were executed, Grant had not completed its audit, and the purchase terms were fixed on the basis of unaudited statements previously prepared by another accounting firm.

Petitioner's President testified at his deposition that the purpose of the Grant audit was solely to confirm the unaudited figures used in fixing the contract terms, and that petitioner was bound to consummate the purchase if the unaudited figures were, in fact, confirmed (Ralph Papitto Dep., p. 21). The figures certified by Grant did confirm the unaudited financials and the purchase was consummated in accordance with the previously executed contracts.

Subsequent to consummation of the purchase and a later sale of the Webb Group by it, petitioner took the position that the audited financial statement of one of the Webb companies overstated retained earnings by $643,000. The figure for retained earnings shown on the audited statement was, however, more than $643,000 in excess of the figure shown for retained earnings on the unaudited financials used in negotiating the terms of the purchase contract. Accordingly, even if the certified figure for retained earnings had been prepared in accordance with petitioner's theory of proper accounting, petitioner would have been bound to proceed with the purchase pursuant to the already executed contracts.

Petitioner filed identical actions in Rhode Island and Florida seeking damages in the amount of one million dollars from Grant pursuant to Section 10b of the Securities Exchange Act of 1934 and various state law theories. The Court in Rhode Island found that all the significant events in the case had taken place in Florida, and transferred the Rhode Island Complaint to the District Court for the Southern District of Florida.* The Florida Court dismissed

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* The contacts with Florida include the following: (1) Grant was retained in Florida; (2) Webb was a Florida Corporation with its principal place of business in Florida; (3) Grant performed its audit work in Florida; (4) Petitioner's contract to purchase Webb was executed in Florida; (5) Grant's certification was delivered to Webb in Florida; and (6) the purchase was consummated in Florida.

the Rhode Island Complaint without prejudice, and the parties proceeded to litigate the Complaint originally filed in Florida to judgment. Petitioner did not object to the dismissal of the Rhode Island Complaint or make any effort to reinstate it prior to the entry of the summary judgment against it on the Florida Complaint.

The District Court's entry of summary judgment in favor of Grant was based on several grounds. With respect to the federal securities law count, the Court found both that it was barred by the applicable statute of limitations and that the uncontested facts established as a matter of law that the alleged error was neither material nor relied upon.

ARGUMENT

I. THE QUESTION OF WHICH OF THE FORUM STATE'S STATUTES OF LIMITATION SHOULD BE APPLIED TO AN ACTION BROUGHT UNDER SECTION 10b OF THE SECURITIES AND EXCHANGE ACT IS NOT APPROPRIATE FOR CONSIDERATION BY THIS COURT.

The Securities Act of 1934 provides no statutory limitations periods for actions brought under Section 10b since the Act does not itself create a civil action for violation of that Section. In applying the Act, the Courts have, accordingly, applied the traditional federal rule that, where a federal statute prescribes no limitation period, the Court will adopt the most appropriate period prescribed by the law of the forum state (*International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966)).

Petitioner contends that this Court should require that in every state the limitation period applicable to common law fraud be applied to federal claims based on Section 10b. Petitioner asserts that such a holding would eliminate a conflict within the Circuits, would create uniformity, would be consistent with the scienter requirement in a Section 10b action, and would further the policy of the federal securities laws. In fact, there is no conflict among the Circuits,

and adoption of petitioner's argument would not create uniformity, would not result in the application of the most appropriate available limitation period, and would create substantial injustice with respect to those who have relied upon prior decisions.

In the context of a doctrine requiring reference to the law of 50 potential forum states, it is obviously meaningless to discuss a need for uniformity or a conflict among the Circuits. The Courts, in order to select the proper limitation period, are required to, and in fact have, analyzed the law of the particular forum state involved to select the limitation period applicable to the state cause of action which bears the closest substantive resemblance to a Section 10b action. This analysis has inevitably resulted in the adoption of different types of limitation periods within different forum states. In each case, however, the selection has resulted from an analysis of many variances in the provisions of the forum state's laws rather than from any conflict among the Circuits.

The instances in which decisions within a single Circuit apply different types of limitation periods in different states establish that such variations do not arise from substantive differences with respect to the requirements of federal law. In the Sixth Circuit, for example, the Court of Appeals applied the Michigan fraud limitations period to a Section 10b action in *Charney* v. *Thomas*, 372 F.2d 97 (6th Cir. 1967), basing its choice on the absence of a provision analogous to Section 10b in the securities laws of Michigan and on the fact that no prior decision had applied a state securities limitation period to such an action. Subsequent to *Charney*, however, in *Nickels* v. *Koehler Management Corporation*, 392 F.Supp. 804 (N.D. Ohio 1975), a District Court within the Sixth Circuit chose to apply Ohio's securities law limitation period rather than its fraud limitation period. In doing so, the Court distinguished *Charney* on the basis of several differences in the Michigan and Ohio securities and fraud laws.

Similarly, there have been varying results in different forum states within the Eighth Circuit. In *Vanderboom* v. *Sexton*, 422 F.2d 1233 (8th Cir. 1970), the Court of Appeals applied the Arkansas securities limitations period, rather than its fraud period, to a Section 10 action. Subsequently, however, two District Courts within the Eighth Circuit, citing and relying upon the type of analysis made by the Court in *Vanderboom*, chose, on the basis of differences in the relevant state laws, to apply fraud, and not securities, limitation periods to actions brought in Minnesota and South Dakota. *Klapmeier* v. *Peat, Marwick, Mitchell & Co.*, 363 F.Supp. 1212 (D. Minn. 1973); and *Rude* v. *Campbell Square Inc.*, 411 F. Supp. 1040 (D. S. Dak. 1976).

Petitioner's contention that a requirement that the forum state's fraud limitation period be applied in every case would establish uniformity entirely ignores reality. The differences in the limitations periods for fraud in the 50 states are so great that their consistent application might increase, rather than decrease, the variances in the limitation periods applicable to Section 10b actions. In Section 10b cases which have actually adopted the forum state's fraud limitation period, for example, the applicable time period has ranged from 10 years in *Denny* v. *Performance Systems, Inc.*, [1971-72 Transfer Binder] CCH Fed. Sec. L. Rptr. Para. 93, 387 (M.D. Tenn. 1971) to one year in *Weiser* v. *Schwartz*, 286 F.Supp. 389 (E.D. La. 1968), and *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960). As Professor Loss observed with respect to whether the categorization of the federal action among the several state statutes of limitations should be a matter of federal or state law (Loss, Securities Regulation, Vol. III, p. 1774 (1961 Ed.):

> "The . . . question is of little practical significance. Since national uniformity in classification is precluded by the diversification in state limitation categories, submission of the choice of limitations to state law would add little to the variation caused by differing time periods."

Petitioner's claim that the fraud limitation period should be universally adopted because a longer period is more consistent with the policy of the Securities laws is incorrect in two respects. Given the fact that, regardless of what state limitation period is chosen, that period will not, as a matter of federal law, begin to run until discovery of the fraud*, a shorter limitation period appears to be justified. In connection with the 1934 amendments to the securities laws, Congress reduced the limitation periods applicable to sections of the Securities laws for violation of which civil liability was specifically created. The original Securities Act of 1933 provided a limitation of two years from discovery of the alleged misrepresentation for all civil actions under the Act, and a ten year over-all limitation for all actions except those under Section 12(2) (May 27, 1933, ch. 38, Title I, § 13, 48 Stat. 84). The 1934 amendments to the Act, however, reduced the limitation periods within the Act to one year from discovery or three years from the time of wrong, whichever is less. In view of this circumstance, Petitioner's contention that the two year period from date of discovery applied in this case is less consistent with federal policy than the three year period of Florida's fraud statute makes little sense.

The argument that the longest possible limitations period should be selected for Section 10b cases has been made and rejected in recent decisions. *Nickels* v. *Koehler Management Corporation,* 392 F.Supp. 804, 808 (N. D. Ohio 1975); and *Hitchcock* v. *de Bruyne,* 377 F.Supp. 1403, 1407 (D. Conn. 1974). The Court in *Nickels,* clearly summarized the rationale of these cases, stating:

> "This virtually unbroken pattern of limitations of one year from discovery and absolute bar after three

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* *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946), *Tomera* v. *Galt,* 511 F.2d 504 (7th Cir. 1975); and *Vanderboom* v. *Sexton,* 422 F.2d 1233 (8th Cir. 1970).

> years from sale or other event strongly suggests a Congressional policy favoring short limitations periods rather than the longer ones found in many states' common law fraud statutes. . . . Unduly long limitations periods would appear to permit those who claim to be aggrieved by violations of the Act to lie in wait for the stock market to take a propitious turn before they visit the courthouse. While this Court has little sympathy for those who prey on the gullible and the unwary, the fact that Congressional policy is to protect the innocent investor does not mean that Congress also intended to favor one who loses his innocence and then waits to see how his investment turns out before he decides to invoke [the Act]."

Even if it were consistent with federal policy to apply the longest possible statute of limitations, uniform application of the fraud statute would not accomplish this purpose. The one year fraud periods in Alabama and Louisiana which were applied in the *Weisser* and *Hooper* cases were obviously not the longest available, and in *Berry Petroleum Company* v. *Adams & Peck,* 518 F.2d 402 (2nd Cir. 1975), the Court chose the three year limitation period under the Texas Securities laws over the shorter two year fraud statute.

The view that fraud limitation periods should always be applied because both fraud and Section 10 actions require scienter is also simplistic and erroneous. The Court's decision in *Ernst & Ernst* v. *Hochfelder,* —U.S.—, 47 L. Ed. 2d 688 (1976), leaves the exact nature of the scienter requirement under Section 10b in doubt by indicating that reckless conduct may be sufficient (fn. 12), and, in any event, scienter is only one of several elements of a Section 10b action. Each of these elements are reflected in varying degrees in the securities and fraud laws of any particular state, and all must be considered. Moreover, there are states in which fraud actions do not require proof of scienter, states in which proof of scienter is required under

the state securities laws, and states in which both or either of the fraud and securities laws require some modified form of scienter. The modern trend of decisions in the fraud area, in fact, has been to dispense with the requirement of scienter and to recognize actions based on grossly or ordinarily negligent misrepresentations. This trend was noted in the recent Section 10b case of *Cash* v. *Frederick & Company, Inc.*, 57 F.R.D. 71, 76 (E.D. Wis. 1972), in which the Court stated:

> "It now appears that a fraud action itself no longer requires scienter, but is fast becoming satisfied with proof that, considering all the circumstances, the defendant did not act as would the ordinarily prudent person to avoid misrepresentations, either express or by omission. Note, 63 Mich.L.Rev. 1070, 1079 (1965); United States v. Schaefer, 299 F.2d 625, 629 (7th Cir. 1962); Sevenson v. Barwineck, 8 Wis. 2d 557, 99 N.W. 2d 690 (1959) (Fairchild, J.). Thus, it is possible that courts which have spoken in negligence language have not totally departed from a fraud theory but are only reflecting a basic liberalization in the concept of fraud itself."

Several decisions illustrate the inappropriateness of a blanket determination that the fraud limitation period must be applied in every forum state as a result of the scienter requirement. In *Klapmeier* v. *Peat, Marwick & Mitchell & C., supra,* 353 F.Supp. 1212 (D. Minn. 1973), the Court chose to apply the fraud limitations period for several reasons among which was the fact that a Minnesota fraud action *does not* require proof of scienter. In *Berry Petroleum Company* v. *Adams & Peck, supra,* 518 F.2d 402 (2nd Cir. 1975), the Court applied the Texas securities law limitation period although scienter was required in a Section 10b action in that Circuit, but was not required by the Texas securities laws. The Court recognized this difference, but found that other factors justified application of the securities limitation period regardless of it. And in *Hitchcock*

v. *de Bruyne,* 337 F.Supp. 1403 (D. Conn. 1974), the Court chose to apply the securities law limitation period, rather than the fraud period, because, among other things, the Connecticut securities laws *required proof of scienter.*

Adoption of petitioner's position that the forum state's fraud statute must always be applied in a Section 10b action would, in fact, destroy the only element of consistency which is important with respect to limitation periods. Such a holding would result in a change in the limitation periods applicable to Section 10b actions in the majority of jurisdictions where this issue has already been resolved. Although such a change might either shorten or lengthen the applicable period, it would, in every case, defeat the expectations of many actual or potential litigants who have acted, or refrained from acting, in reliance on prior decisions.

The very decisions of the Ninth Circuit upon which petitioner relies in its attempt to establish a conflict among the Circuits, expressly recognize the overriding importance of the need to maintain consistency in the application of limitation periods. In *Douglas* v. *Glenn E. Hinton Investments, Inc.,* 440 F.2d 912 (9th Cir. 1971), for example, the Court chose to apply Washington's fraud statute rather than its securities law statute. In reaching this decision, the Court cited several prior cases which had applied the Washington fraud statute to Section 10b actions prior to enactment of Washington's securities law. It then concluded that, regardless of factors which indicated that the state Securities Act limitation period would be applied if the question had not been previously considered, the need to maintain stability as to the applicable statute was of overriding significance. It stated (440 F.2d at 916):

> "Moreover, for us to change the applicable limitation period because the local law of securities regulation has changed would add an unnecessary uncertainty to the prosecution of federal claims under section 10(b). We

> do not believe federal policy is advanced by changing the law governing the timeliness of federal claims to correspond with each change in the substantive elements of a claim under the local securities law. Aggrieved persons have come to rely upon our prior holdings. Reasonable stability in laws pertaining to voluntary relationships between parties, and the right of access to the courts to question those relationships, is a worthwhile objective as well."

Accord: *United California Bank* v. *Salik,* 481 F.2d 1012 (4th Cir. 1973).

In short, the issue of which of the limitation periods of the forum state to apply in a Section 10b action is one which is not capable of a single national resolution. The variations among the laws of the several states requires a careful individual analysis of those laws before an appropriate determination can be made. Such an analysis will inevitably result in the application of different types of limitation periods in different states, but such differences are necessary if the most appropriate period is to be applied in each case.

II. THE CHOICE OF LAW ISSUES IN THIS CASE RAISE NO SIGNIFICANT FEDERAL QUESTION.

Petitioner's contention that this Court should determine whether Florida or Rhode Island law applies to the facts of this case is without merit. The resolution of the choice of law issues raised are dependant on a review of the conflict of law principles of the forum state of Florida and an application of those principles to the unique facts of this case. Obviously, the interpretation of principles applied by Florida courts or the application of those principles to the facts present here raise no federal question, much less a question of sufficient significance to justify this Court's attention.

III. THE PROPRIETY OF THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT RAISES NO SIGNIFICANT FEDERAL QUESTION.

The question of the propriety of the District Court's entry of summary judgment has been fully reviewed and affirmed by the Court of Appeals. Petitioner does not contend here that the trial court applied any erroneous principle of law in entering the judgment, nor does it point to anything in the record establishing the existence of a disputed issue of material fact. Instead, it relies on vague generalities with respect to the extent of the discovery which was had and the existence of potential expert witnesses who might have testified on Grant's behalf. The scope of discovery, coupled with petitioner's failure to identify any material factual issue, merely confirms the propriety of the District Court's judgment, and, certainly, the addition of expert testimony on behalf of Grant would add nothing to petitioner's case. Petitioner had the opportunity to rely on all the discovery material filed in the case, and to file its own affidavits, in opposing Grant's motion for summary judgment. Despite this opportunity, no material factual issue has ever been raised.

CONCLUSION

For the foregoing reasons, Alexander Grant & Company respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

HOWARD L. KASTEL
RONALD J. SKLAR
JEFFREY H. VERBIN
ROBERT L. PARKS
Attorneys for Defendants-Appellees

ALTHEIMER & GRAY
Chicago, Illinois

PODHURST, ORSECK & PARKS, P.A.
Miami, Florida
Of Counsel

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In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-630.

NORTEK, INC.,
PETITIONER,

v.

ALEXANDER GRANT & COMPANY, ET AL.,
RESPONDENT,

v.

SANI DISTRIBUTORS, INC., ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Reply of Petitioner to Brief in Opposition to Petition for a Writ of Certiorari.

JOHN F. BOMSTER,
RICHARD G. GALLI,
ADLER, POLLOCK & SHEEHAN, INCORPORATED,
One Hospital Trust Plaza,
Providence, Rhode Island 02903.
(401) 274-7200

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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At page 2 of the brief for defendants-appellees, there appear certain incorrect factual representations:

In the text it is stated that Nortek was "bound to consummate the purchase if the unaudited figures were, in fact, confirmed."

On the contrary, the purchase agreement does not so provide. Further, Attorney Dressler, who represented Nortek in respect of the acquisition, was questioned as to the purpose for the furnishing of the financial statements and testified as follows:

> "No, to put it another way, I think, to look at it from a lawyer's point of view, Nortek had the right to accept or reject the acquisition if it did not find financials referred to in that letter acceptable, irrespective of whether they were consistent or inconsistent with the prior financials." (*Dressler Deposition*, p. 15.)

In the footnote at page 2 it is said that Grant was retained in Florida, performed its audit work in Florida, and delivered its certificate in Florida.

In fact, Grant does not appear to have been licensed to practice in Florida and its engagement letter issued out of New York though signed by Webb in Florida. Further, while Grant utilized both its personnel and those of a prospective Florida merger partner, to perform audit work in Florida, it controlled the job out of New York. *Maurer Deposition*, p. 142. Finally, there is no evidence that Grant's certification was delivered in Florida. That issue remained open at the time the District Court entered its order on summary judgment. What does appear is that the audit opinion sued upon was sent to Nortek in Rhode Island on Grant's New York letterhead.

For reasons stated in petitioner's original brief, the action is one which warrants review by this Court and it is respectfully requested that the petition be granted.

Respectfully submitted,

JOHN F. BOMSTER,
RICHARD G. GALLI,
ADLER, POLLOCK & SHEEHAN,
INCORPORATED,
One Hospital Trust Plaza,
Providence, Rhode Island 02903.
(401) 274-7200